No. 4026

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Defendant in Error,
JOHN G. MORAN and Etal,
Plaintiff in Error.

Opening Brief of Plaintiff in Error

FRED THOMPSON,
704 Finance Bldg.,
Los Angeles, Calif.,
Attorney for Plaintiff in Error.

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JOHN G. MORAN and Etal, *Plaintiff in Error.*	

OPENING BRIEF OF PLAINTIFF IN ERROR

STATEMENT.

This is an acting by the United States Government to recover on a bail bond.

The defendant and plaintiff in Error demurred to the complaint and contended that the bail bond upon which the action is predicated is not good in law.

The court over-ruled the demurrer and held the bail bond good in law.

The plaintiff in error is before this court on a writ of error upon the questions presented.

ASSIGNMENT OF ERROR.

1. The Court erred in not sustaining the demurrer of the plaintiff in error and the defendant below to the complaint.

2. The Court erred in holding good in law the bail bond upon which the action is predicated.

3. The judgment of the Court is by the reason thereof contrary to law, by reason whereof plaintiff in error prays that the judgment aforesaid may be reversed, etc.

THE BOND IS INVALID, WITHOUT LEGAL EFFICACY, AND IS NOT GOOD IN LAW.

I. For the reason that it does not substantially conform to the requirements of the laws of the State of California.

II. For the reason that it does not state briefly the nature of the offense charged.

III. For the reason that the bond contains no promise on the part of the sureties that if accused fails to perform the conditions nominated in the bond that they will pay to the United States Government the sum in which the accused is admitted to bail.

IV. For the reason that it does not designate the time or Court in which the accused is to appear.

V. For the reason that the bond was not on file and was not a record when the bond was declared forfeited.

I.

THE BOND IS INVALID FOR THE REASON IT DOES NOT STATE BRIEFLY THE NATURE OF THE OFFENSE.

United States v. Dunbar 83 Fed. Rep. 153

This Court at Pg. 154 construing Sec. 1014 of Rev. St. of the United States said:

> "The purpose and effect of the use of congress of the words in the foregoing provision 'agreeable to the usual mode of process against offender in such State' was to assimulate all the proceedings for holding accused persons to answer before a court of the United States to the proceedings had for a similar purpose by the laws of the State where the proceedings take place."
>
> "The real question, therefore, is whether the recognizance sued on are valid when tested by the requirements of the Oregon Statute in regard to bail."

The question is therefore settled at least so far as this district is concerned.

THAT THE VALIDITY OF BAIL BOND IN A UNITED STATES COURT IS TESTED BY THE REQUIREMENTS OF THE STATUTES OF THE STATE WHERE SUCH UNITED STATES COURT IS LOCATED.

We quote Sec. 1278 of the California Penal Code:

> "An order having been made on the ..... day of ....., A. D. eighteen (nineteen) ....., by A B, a justice of the peace of ..... county (or as the case may be), that C. D. be held to answer upon a charge of (stating briefly the nature of

the offense), upon which he has been admitted to bail in the sum of ..... dollars; we, E F and G H (stating their place of residence and occupation), Hereby undertake that the above-named C D will appear and answer the charge above mentioned, in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court, and if convicted, will appear for judgment and render himself in execution thereof, or if he fails to perform either of these conditions, that we will pay to the people of the State of California the sum of ..... dollars (inserting the sum in which the defendant is admitted to bail).

In the Dunbar case the Court in construing the Oregon statute which is the same as Sec. 1278 said:

"The requirements is that the bond shall designate the offense generally. The Supreme Court of the State of Oregon in the case of Belt vs. Spaulding, 17 Or. 134, 20 Pac. Rep. 827 held that Sec. 1470 introduces no new rule but left the law just as it was before its enactment. In other words said the Court."

"It is declaratory of the common law upon that subject which the court declared to be that the undertaking must on its face indicate briefly the nature of the offense charged and unless it does so it is not binding that this may be done by name when the offense charged has a technical name, and, if not, then enough must be stated in the undertaking to point out clearly that a particular crime known to law is charged."

"That this is the general rule is shown by the authorities cited by the Court in Belt vs. Spaulding."

The bail bond in the Dunbar case *did* point out clearly that a crime had been committed against the Government of the United States i. e. the unlawful aiding and abetting the landing of Chinese labor in the United States.

In the Dunbar case the Court further said:

In the indictment the names of person or persons with whom the defendant conspired as well as the acts done must of course be stated. But no such particularity is essential in a recognizance *which only* need *state the general nature of the offense.* (Italics ours.)

> "That this may be done by name when the offense charged has a technical name, and, if not then *enough must be* stated *in* the undertaking to *point out clearly* that a particular *crime known to law is charged.* (Italics ours.)

The law enunciated by this Court in the Dunbar case is so clear, so controlling that no citation of authorities or argument is necessary to sustain plaintiff in error, contention that the recognizance sued on is invalid.

In United States vs. Sauer, 73 Fed. 671 the Court said:

> "It is perfectly clear that a recognizance nor the *Sire Facias* upon it will be sufficient to authorize or support a judgment against the principal or sureties when the charge does not appear to be such as may be the subject of a criminal prosecution and which requires bail. To answer to a charge of felony would be sufficiently explicit because for a felony an indictment would lie. But no indictment can be maintained on a charge having in possession stolen goods."

The opinion by the learned Judge in this case is one of much interest and plaintiff in error solicits this court's attention to same.

It may be at this point well to consider just what the Legislature of the State of California meant when it provided in Sec. 1278 that "the nature of the offense must be briefly stated."

In the case of Spaulding vs. Belt cited with approval by the Court in the Dunbar case, it is said:

> "This objection suggests two questions; First, whether or not an undertaking in a criminal proceeding which fails to describe on offense punishable by the laws of the State is for that reason invalid. Second, whether the undertaking in question describes such offense."

In construing Sec. 1470, of the State of Oregon the Court said:

> "Sec. 1470 of Hills code prescribes the form of the undertaking to be given in a criminal case prosecuted before indictment requires that the nature of the crime be briefly stated in such undertaking.
>
> "This Section evidently intends that there should be a crime charged, and that its nature the sum of qualities and attributes which make it a thing what it is, as distinct from others of its kind, sort, character or species, be briefly stated in the undertaking. This statutory requirement then, it is believed introduces no new rule but left the law just as it was before its enactment. In other words it is declaratory of the common law on that subject."

The Court cites numerous authorities on that point then says:

> "The rule announced by these authorities is reasonable. It imposes no inconvenience upon the

> public and it is notice to the bail of the gravity and importance of their undertaking. The undertaking, I think, must on its face indicate briefly the nature of the offense charged and unless it does it is not binding. I do not mean by this that it should be stated with the technical particularity necessary in an indictment, far from it. If the crime charged be one that has a technical name, as murder, arson, burglary, rape, larceny, and the like it will be sufficient to indicate the charge by such general name. If not, enough must be stated in the undertaking to point out clearly and unmistakably that a particular crime known to law of the State is charged."

Can the English language make the interpretation of the statute any clearer?

The interpretation of the Statute by this Court is the rule enunciated by the "common law."

It has the sanction of the legislature of the State of California and is stamped with the approval of the Court in United States vs. Dunbar.

Is there anything further to be said in the matter of establishing Plaintiff in Error's contention that the bail bond does not conform to the requirement of the Statute of the United States and the State of California, and is therefore invalid.

The recognizance in this action cite no facts, describes no offense, names no crime, fails to describe the nature, the sum of qualities which go to make up an offense against the laws of the United States.

The words violation of Sec. 217 of the Penal Code is not descriptive of the offense attempted to be charged, it describes not the nature of the offense, the sum of qualities, and attributes which go to make

up one offense as distinct from other offenses made punishable by Sec. 217 of the Federal Penal Code.

There are distinct and separate offenses provided for by Sec. 217 and for which distinct and separate penalties are provided.

In what way can this Court ascertain from the bond? In what way can the principal or his sureties ascertain? What part or portion of the statute the accused is charged with violating? The sureties were entitled to notice and entitled to be advised of the gravity and importance of the undertaking. Had the recognizance on its face indicated briefly the nature of the offense an entirely different situation might have occurred. The bail was entitled to be advised of the gravity of the offense, the importance of their undertaking.

Keeping now in mind the language of this Court in the Dunbar case:

> "The real question therefore, is whether the recognizance sued on are valid when tested by the requirements of the Oregon statute in regard to bail."
>
> "The requirements is that the bond shall designate the offense generally. The Supreme Court of Oregon in the case Belt vs. Spaulding 17 or 134, 20 Pac. 827 held that Sec. 1470 of the Oregon Statute introduces no new rule but left the law just as it was before its enactment. In other words said the Court, it is declaratory of the Common Law upon the subject which the Court declared to be that the undertaking must on its face indicate briefly the nature of the offense, and unless it does so it is not binding that this may be done by name when the offense

> charged has a technical name, and if not, then enough must be stated in this to point clearly that a particular crime known to law is charged."

Therefore, now consider and weigh the bail bond upon which the action is predicated in connection with the law enunciated by this Court. Keeping in mind the provision of Sec. 1287 of the Penal Code of the State of California that C. D. be held to answer upon a charge of (stating briefly the nature of the offense) upon which he has been admitted to bail in the sum of .....dollars.

The bond alleges Joseph Bruno is charged with THE CRIME OF VIOLATING OF SECTION 217, Federal Penal Code.

Sec. 217, Federal Penal Code is not a crime, it is an act of Congress under which provisions of this act of Congress certain enumerated things are forbidden to be placed in the United States mails.

The various acts enumerated therein carry different degrees of punishment. The bail bond should briefly state the nature of the acts which constitute the offense for the purpose of contra-distinguishing the particular act from the several other acts which go to make a crime under the provisions of Sec. 217 of the Federal Code. The sureties were entitled to be advised and know the nature and gravity of the act which the accused was charged know what punishment might be inflicted in case of conviction.

California Jurisprudence (Vol. 3, p. 1062.)

> "There are two lines of decision in regard to the necessity that the bond contain a description of the offense. The one which appears to

be supported by the weight of authority holds that the bond must give a description of the offense with which the principal is charged as a means of identifying the case and informing the principal and sureties of the prosecutions assumed. In California the Code prescribes a form of bail bond which must be substantially followed, which requires a brief statement of the nature of the offense. (Sec. 1278 of the Penal Code.) But it is not necessary that the bail bond describe the offense with the same particularities as required in an indictment."

Vol. 3 Ruling Case Law (p. 38, Sec. 43.)

"The weight of authority would seem to make it necessary to the validity of a bail bond or a recognizance for it to set forth the offense with which the accused is charged and a statement containing technical defects in bonds if they are substantially correct will not remedy failure to describe the offense."

Corpus Juris (Vol. 6.)

"The bond or undertaking as a general rule should conform to the statutory requirements. If there is a material variance between the bond as prescribed by law and the bond as executed the latter will be void."

Roe v. State, 24 S. 20, 28.

The Court of Criminal Appeals of the State of Texas said:

The appellant was convicted of crap playing, the State moves to dismiss the case because recognizance shows no offense in stating the game was not played in a private residence, Penal Code, 364, *This not being an offense eo-nomine the elements must be set forth in the Sire Facias and recognizance.* (Italics ours.)

THE BOND IS INVALID FOR THE REASON THAT IT CONTAINS NO PROMISE ON THE PART OF THE SURETIES THAT IF THE ACCUSED FAILS TO PERFORM THE CONDITIONS NOMINATED IN THE BOND THAT *THEY WILL PAY* TO THE UNITED STATES GOVERNMENT THE SUM IN WHICH THE ACCUSED IS ADMITTED TO BAIL.

The Dunbar case we wish to carefully distinguish from the case at bar.

In the Dunbar Bond the Sureties acknowledged that "WE OWE TO THE UNITED STATES GOVERNMENT," the present bond acknowledged no existing debt and contains no promise to pay.

The sureties undertake nothing more then the accused shall answer the accusation whenever or wherever the same may be prosecuted. There is no direct promise by the sureties that they will, in case of the accused defaulting, pay the amount of bail in which the accused is released. No interpretation can be placed on the conditions nominated in the bond that can supply the essential and requisite "we promise to pay", in case of default. The action is predicated upon a contract.

Sec. 1269 of the Penal Code of California, defines the taking of bail:

> "The taking of bail consists in the acceptance by a competent Court of Magistrate of the undertaking of sufficient bail for the appearance of the defendant, according to the terms of the undertaking *or that the bail will pay to the people of the state a specified sum.*" (Italics ours.)

No promise on the part of the sureties can be read into the bond annexed to the Complaint that can be construed as a promise to pay to the Government the amount of bail.

There is nothing in the contract between the parties that can be construed directly or indirectly as a substitute for that essential promise. A valid and binding contract for the payment of the amount of bail was not entered into. The Code requires a promise to pay in case of default and the law of contracts requires it for there must be a meeting of the minds.

In the Dunbar case the recognizance obligated the securities to "OWE" the United States. In other words by the terms of the bond the accused and his sureties acknowledged themselves indebted to the United States which indebtedness was to be wiped out if the accused performed the conditions of the bond. The bond in this action acknowledges no indebtedness and contains no direct promise to pay on the part of the sureties. Hence, there is no meeting of minds, no contract.

IN SAN LUIS OBISPO COUNTY vs. RYAN, 175 CAL, 34-180 PAC. 342, the Supreme Court of the State of California said:

> "One of the conditions provided for by the code to be inserted *in such bond, and in fact the essential requirements as far as sureties thereon is concerned.* (Italics ours.) Is that in the event the defendant fails to do or perform certain things the sureties will pay to the State of California, a sum particularly specified, being the

amount in which the defendant is admitted to bail. In fact to pay a designated penal sum in the event of the delinquency of their principal.

"It is a familiar rule of law that sureties cannot be held beyond the terms of their contract of suretyship."

"The law requires and the form of bond set out in the code provides, that the sureties shall bind themselves in the event the appealing defendant fails to do a certain thing they will pay to the State of California a specified sum. A valid bond would have provided that "we (the sureties), will pay to the State in the event our principal fails to comply with any of the conditions the sum specified as a penalty. There being nothing in the bond which bound them to pay any penal sum in the event of the delinquency of the principal and standing upon the strict terms of their contract, they can not be compelled to do it. This should require no further discussion. The code provisions, it is true, contemplated that sureties on a bail bond should bind themselves and the bond should so provide, but the trouble the bond here is that it does not do so and this Court can not make a different contract for the parties then they themselves have made." The case of Merced v. Shaffer, et al., 40 Cal. App. Rep. 163, is a persuasive authority sustaining plaintiff in error contention.

THE BOND IS INVALID FOR THE REASON IT DOES NOT REQUIRE ACCUSED TO APPEAR IN SOME COURT.

To force the accused to appear "whenever" or "wherever" and answer said charge or any matter or thing that may be objected, against him is too

indefinite, uncertain and onerous to make a valid and binding contract and is not in compliance with the law.

The Statutory form of bond required by the State of California (Sec. 1278) requires that accused shall be recognizant to appear before a court.

Corpus Juris (Vol. 6, p. 1017.)

> "The bail bond must properly designate the Court before which the accused is to appear and if such court is not properly designated the undertaking is defective."
>
> "A recognizance is defective when it cannot be ascertained whether the appearance is to be before a magistrate for examination or before a court for trial."
>
> Grigshy vs. The State, 6 Yerg. 334 (Tenn.);
>
> Sherman vs. State, 4 Kan. 570.

The court is without legal jurisdiction to recognizant a person to appear in any place other than a duly and legally constituted Court or tribunal.

In Mader vs. State Tex. Criminal Court of Appeals, 34 S. W. 114,

> "A recognizance which does not specify the Court before which defendant shall appear is fatally defective."

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

The bond is a contract, in every contract certain contractual rights, obligations, and duties exist between the parties.

The bond specifies no court or tribunal where the

defendant is to appear, it specifies no time for him to appear.

A contractual duty therefore is imposed upon the government to inform the accused and his sureties when said cause is to be heard and WHERE said cause is to heard.

Keeping in mind the conditions nominated in the bond and the contractual duty the parties let us examine the complaint.

Paragraph V of the complaint makes the only reference to this matter:

> "That after proceeding had and upon notice to these defendants John G. Moran and W. E. Smith the said cause was set down for hearing on the 13 day of Nov. 1923, that on that said date the said Joseph Bruno, defendant in said action, failed to appear before the said commissioner and the sureties on said bail bond, John G. Moran and W. E. Smith were called to produce the said Joseph Bruno but they failed to produce him; where upon said commissioner declared said bond to be forfeited."

The complaint is as silent as the grave where the accused is to appear and where the cause is set for hearing. The undertaking imposes a duty on the part of the government to inform not only the sureties but the accused as well WHERE HE SHALL APPEAR as well as when he shall appear and answer.

As a matter of illustration it might have been in this case, as well as it occurred frequently in other cases in the days of 1923, the commissioner held his

proceedings in various places, sometimes in one place, sometimes in another; the accused might have appeared on the 13 day of Nov. 1923 in the regular court room of the commissioner and for some reason unknown to the accused the commissioner was holding court some where else.

If it is mandatory on the Government to inform the sureties when the defendant is to appear and answer, it is equally mandatory to inform them where he shall appear and answer. If it is essential to allege in the complaint when the cause if set for hearing, it is equally essential to allege where it is set for hearing.

The time of day when the accused is to appear is essential to a proper notice.

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

I. It is not alleged the commissioner called the cause for hearing or that he called upon the defendant to appear and answer to the charge against him.

II. It is not alleged that judgment was entered upon the forfeiture.

III. It is not alleged that the bond is a matter of record.

Addressing myself to the first proposition it is conditioned in the bond that the accused shall not only appear but he shall appear AND answer said charge, that is, he must answer before the bar of Justice any matter or thing that may be objected against him.

It is not meant by the terms of the bond that there shall be a mere physical appearance of the accused in the court room, but it is meant by appearance that the accused shall after the cause is called by the court APPEAR AND ANSWER to the call. It is not alleged in the complaint the cause was called for hearing or that the commissioner called *upon the defendant to appear and answer.* The complaint is bad for that reason.

Peck vs. State, 4 Ga. 329, said:

> "Before the sureties can become liable the record must show that the principal was called and did not appear. There must appear upon the record a judgment of forfeiture. This judgment is a matter of substance it involves serious consequences to the parties it is of such absolute verity that nothing can be urged against it."

To the same effect is the case of State of West Virg. vs. Dorr, 53 So. E. 120. In McGuire vs. State, 124 Ind. 23 N. E. 85.

The court said:

> "It is not sufficient to call and default the recognizance; but that it is also necessary the court should enter a formal judgment of forfeiture."

Vol. 8 Am. Cases Pg. 1020, 44 W. Va. 308, 28 S. E. 930.

> "Calling the accused and entering default upon record is a condition preceding to forfeiture of recognizance."

In U. S. V. Rundlett Fed. Case No. 16208 the Court said:

> "To maintain action on a recognizance the declaration must show a breach of its condition

and as the recognizance is required and taken by the commissioner pursuant to an authority conferred on him by law and to satisfy certain legal requirements, the nature, extent, and limitations of the responsibility created thereby, are to be determined not by a mere examination of the terms of the instrument but also by the rules of law which are applicable thereto."

"One of these rules of laws required the principal cognizor to be called and his default entered; and the legal effect of the conditions is such that it is not broken by nonappearance generally to be proven by any evidence, but only by nonappearance in answer to a call, to be proven by an entry made in the minutes of a magistrate and returned by him as a part of the proceedings.

"It is clear also that a declaration must show upon a default a time and place when and where the cognizor was bound by law to answer."

In George Brooks vs. the U. S., 6 N. M. 72, the court said:

"It is essential to a breach of contract of a recognizance that the declaration must show that the party who was to appear was solemnly called and warned before his default was entered. A recognizance is not forfeited except by the failure of cognizor to appear and answer a call made at the proper time and place. The declaration being fatally defective the court should have sustained the demurrer."

In Dillingham vs. U. S. 4 Wash. 422, the Court said:

"We hold it to be essential to a breach of the condition upon which the forfeiture is to arise that the party who is recognizant to appear should be solemnly called before his default is

> entered it should be clearly proved that the party was called and neglected to appear. This is far from being a matter of form only but on the contrary is a human provision to prevent a forfeiture from ignorance of the accused."

Plaintiff contends, that the Court must, before declaring the bond forfeited required the defendant to be called "to come into court," and that in the event the defendant does not answer the call, that the bondsman shall each be called separately "to produce the body of the defendant as you have promised to do or forfeit your bond."

This is a condition prerequisite which must be alleged and proven.

THE COMPLAINT IS BAD FOR THE REASON IT IS NOT ALLEGED THAT THE BOND WAS FILED IN COURT OR THAT IT BECOME A MATTER OF RECORD.

In the Case of Mendicino Co. v. Lamar, 30 Cal. 629, the Supreme Court of the State of Cal. said:

> "It is objected that the complaint does not aver that the recognizance was filed in court or become a matter of record."
>
> "A recognizance is an obligation of record; and in an action on such obligation it should be alleged that the same was a record."

The Court Erred in not sustaining the demur on the ground of uncertainty.

The complaint is ambiguous and uncertain for the reason that it cannot be ascertained therefrom who set the cause for hearing on the 13 day of November

1923, who informed the defendant that said cause was set on said date, it is uncertain for the reason that it can be ascertained from the complaint, how the sureties were informed that said cause was set for said dates, or that they were informed of that fact, the complaint is uncertain for the reason that it cannot be ascertained from the complaint or bond for what offense the bond is given. The complaint is uncertain for reason it can be ascertained the date the bond was declared forfeited. The demurrer should be sustained on the grounds set forth in the demurrer.

Respectfully submitted,

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Attorney for Plaintiff in Error.